TABLE OF AUTHORITIES

Cases	Pages
Bay v. Merrill etc. Co., 243 US 40, 61 L ed. 580	3
Lehigh V. R. Co. v. Huhen, 10 F2d 78 (Circ. 2)	2, 3
McCluskey v. Marysville & N. Ry. Co., 243 US 36, 61 L ed 578	3
Pedersen v. Delaware etc. R. Co., 229 US 146, 57 L ed. 1125	3
Rainwater v. Chicago R. I. P. Ry. Co., 207 La. 681, 21 So. 2d 872	3
Santa Fe etc. Ry. Co. v. Grant Bros. Const. Co., 228 US 177, 75 L ed. 787	2
Treasurer of Indiana v. Wood Preserving Corp., 313 US 62, 85 L ed. 1188	4
Vaught v. East Tennessee etc. Co., 128 Tenn. 349, 255 SW 595	2
Zenz v. I.A.C., 176 Cal. 304, 168 Pac. 364	2

In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 418

SOUTHERN PACIFIC COMPANY,
a corporation,
Petitioner,

vs.

OVE E. ERICKSEN.

Petitioner's Reply Brief on Petition for Certiorari

Only one matter in respondent's brief in opposition to our petition for a writ of certiorari calls for comment.

The point is made that the inspection of the ties was an integral part of the loading procedure which put the ties into cars destined for interstate points. [It is not. Loading was done by the vendor, Cheney Company. But we pass this and for the moment assume it is part of loading.] It is then said that loading goods for interstate commerce is activity within the Federal Employers' Liability Act. This overlooks the fact that when petitioner purchased ties, had them put

in its own cars and then carried them to various points for such use as might later be determined **it was not acting as a common carrier.**

The three cases cited by respondent are readily distinguishable. In *Zenz v. I. A. C.*, 176 Cal. 304, 168 Pac. 364, the deceased was handling United States mail. It did not belong to the railroad. The railroad was carrying it for hire. In *Vaught v. East Tennessee etc. Co.*, 128 Tenn. 349, 255 SW 595, Vaught was a truck-handler injured while he was loading revenue shipments on to an interstate train. In *Lehigh V. R. Co. v. Huhen*, 10 F2d 78 (Circ. 2), the deceased was a baggagemaster "and at the time of the accident was in the performance of his duties in a baggage car of a passenger train". The holding was that the evidence was sufficient to warrant an inference that the train was an interstate train because it was carrying interstate mail.

But a railroad is not acting as a common carrier in carrying materials to be used in the construction or maintenance of its line.

The precise point is ruled by *Santa Fe etc. Ry. Co. v. Grant Bros. Const. Co.*, 228 U.S. 177, 186-188, 75 L ed. 787, 792, 793. The railroad entered into a contract with a construction company to have construction work done. As part of the agreement the railroad undertook to haul materials and in the contract there was a provision limiting its liability. The validity of this provision turned upon whether the railroad was acting as a common carrier. If it were the provision was not enforceable. If it were not, the provision restricted its liability. It was held that the railroad was not acting as a common carrier:

> "In constructing, improving, or repairing its road, and in building its extensions and branches, the rail-

road company is providing facilities for its service as a common carrier, but, of course, is not acting as such. It may do the work itself, if it chooses, or it may make it the subject of contract with another. In the latter case it simply employs an appropriate agency. The haulage by the railroad company of the men, appliances, and supplies, required by the contractor for the purpose of the construction or improvement, to or from the point on its line where the work is to be done, is merely incidental to the work itself. * * * It is clear that in dealing with transportation of this character over its own road, in connection with construction or improvement, a railroad company is not acting in the performance of its duties as a common carrier, * * *."

Compare *McCluskey v. Marysville & N. Ry. Co.*, 243 US 36, 61 L. ed. 578 and *Bay v. Merrill etc. Co.*, 243 US 40, 61 L ed. 580.

With respect to the ties the railroad would not be acting as a common carrier until the ties were put under the rails and a revenue train passed over the rails. Taking designated ties for a specific and designated use in the repair of the highway of commerce is close enough to the business of common carriage by rail to be a part of it. It is not their carriage that makes the railroad a common carrier but their dedication to repair of the highway of commerce. This is extent to which *Rainwater v. Chicago R. I. P. Ry. Co.*, 207 La. 681, 21 S. 2d 872 goes. It goes no further than *Pedersen v. Delaware etc. R. Co.*, 229 US 146, 57 L ed. 1125 where materials to be used in repair of a bridge were being taken to the bridge. But this handling of specific materials already committed to specific use in the repair of facilities committed to interstate common carriage by rail is a far

cry from inspecting lumber at the plant of the railroad's vendor in the course of acquisition of ties by the railroad for general, future and undesignated use. If a railroad, transporting its own materials over its own line for construction, improvement or repair, is not acting as a common carrier by railroad, certainly it is not acting as a common carrier by railroad in the more remote activity of purchasing supplies. The fact that at a future and as yet undetermined time they will be put to some use (as yet not fixed) does not come close enough to transportation to bring the carrier or its inspector under the Act, unless all employees of a railroad are under the Act and they are not. We again respectfully call attention to *Treasurer of Indiana v. Wood Preserving Corp.*, 313 US 62, 85 L ed. 1188 and the cases cited in note 50 of the petition.

It is respectfully submitted that the petition should be granted.

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